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Neutral Propaganda: Three Films "Made in Canada" and the Foreign Agents Registration Act

by ANNE DORFMAN*

I Introduction

In 1934, the United States House of Representatives formed the House Un-American Activities Committee ("HUAC")¹ to investigate the problem of mass dissemination of "Nazi . . . and certain other subversive propaganda" distributed in the United States.² Much of this material, which exhorted Americans to support Nazi or Communist causes, was produced outside the United States but, by not identifying its foreign source, was designed to give the impression that it originated in this country.³

HUAC's efforts resulted in passage of the Foreign Agents Registration Act of 1938 ("FARA" or "the Act").⁴ The primary stated purpose of the Act was "to require the registration of certain persons employed by agencies to disseminate propaganda in the United States."⁵ Section 4 of the Act⁶ requires the

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1. That committee, chaired by Rep. McCormack, was also known as the McCormack Committee. See generally T. TAYLOR, *GRAND INQUEST* (1955).

2. H.R. Res. 424, 73d Cong., 2d Sess., 78 CONG. REC. 11,069 (1934); see also H.R. Res. 198, 73d Cong., 2d Sess., 78 CONG. REC. 13 (1934). Vast quantities of pro-Nazi and pro-Communist materials were distributed throughout the country. Schwartz & Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. PA. L. REV. 621, 624-25 (1959).

3. Note, *Government Exclusion of Foreign Political Propaganda*, 69 HARV. L. REV. 1393, 1396 (1955). Just as Tokyo Rose wanted her listeners to believe that she acted in the interests of the United States during World War II, or as "dirty tricks" operations may involve planting incriminating materials identified as originating with a particular group to discredit them, this material was designed to manipulate its receivers by obscuring its origin. See D. MASON, *WHO'S WHO IN WORLD WAR II* 327-28 (1978); C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* 112-30 (1974).

4. Act of June 8, 1938, ch. 327, 52 Stat. 631 (1938) [hereinafter cited as *1938 Act*]. The Act is also known as the McCormack Act. See H.R. REP. NO. 153, 74th Cong., 1st Sess. 23 (1935). The current version of FARA is found at 22 U.S.C. §§ 611-621 (1983).

5. Pub. L. No. 75-583, 52 Stat. 631 (1938). The statement of purpose indicated

labeling of all "political propaganda," defined in section 1(j) to include:

any oral, visual, graphic, written, pictorial, or other communication or expression . . . which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions.⁷

Section 4⁸ also requires persons registered under the Act⁹ who distribute films in this country to file "dissemination reports"¹⁰ listing to whom the films are distributed, the dates on which they are shown and an estimated record of attendance at each showing.¹¹ These reports are available to the public.¹²

In January 1983, the United States Department of Justice informed the National Film Board of Canada ("NFBC" or "the Film Board") that three of its documentary films¹³ had been

that the Act was also to be used "for other purposes." See *infra* notes 28-31 and accompanying text.

6. 22 U.S.C. § 614 (1982).

7. 22 U.S.C. § 611(j)(1) (1982). Section 1(j)(2) defines political propaganda as any communication "which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot or other conflict involving the use of force or violence in *any other* American republic or the overthrow of any government or political subdivision of *any other* American republic by any means involving the use of force or violence." (emphasis added).

8. 22 U.S.C. § 614(a) (1982).

9. See *infra* note 47.

10. See 28 C.F.R. § 5.401 (1983).

11. FARA is enforced under 28 C.F.R. §§ 5.1-5.801 (1983). See 32 C.F.R. 6362, Apr. 22, 1967; 46 C.F.R. 52355, Oct. 27, 1981.

Section 5.401 requires that the names and addresses of "any station, organization or theater" exhibiting a propaganda film be disclosed on Form OBD-69. These § 4 requirements bear no easily discernible relationship to the government's stated purpose of informing viewers about the source of the materials they see. They are possibly related to the government's alleged national security interest in monitoring propaganda, which the Department of Justice claims counterbalances any encroachment by FARA on the first amendment rights of film producers, exhibitors and viewers. See *infra* notes 143-153 and accompanying text and note 85.

12. 22 U.S.C. § 616 (1982); 28 C.F.R. § 5.600 (1983).

13. The films, which range in impact from innocuous to powerful, are documentaries about environmental pollution and potential nuclear holocaust. *If You Love This Planet* was awarded an Academy Award as Best Short Documentary of 1982. Washington Post columnist Mary McGrory said of *Acid Rain: Requiem or Recovery* that

designated "political propaganda" under section 1(j) of FARA and must be so labeled before being distributed in the United States.¹⁴ These films examine important public policy issues of concern to both United States and Canadian citizens. Two of the films, *Acid Rain: Requiem or Recovery* and *Acid From Heaven*, look at the effects of the contamination of rain water by airborne pollutants.¹⁵ *If You Love This Planet* discusses the probable effects of nuclear war.¹⁶ The constitutionality of FARA's application to these films is the subject of pending litigation.¹⁷

"[a] more tactful, neutral, inoffensive presentation of a fearful problem that is being visited on one country (theirs) by another country (ours) cannot be imagined." McGrory, *Justice Department's Boos Make Film Subjects Baffo Box Office*, Wash. Post, Mar. 1, 1983, at A3, col. a.

14. Each year about half of the approximately 25 films reviewed by the Justice Department are found to be "propaganda." Wash. Post, Feb. 27, 1983, at B6, col. a. 22 U.S.C. § 614(b) requires that any political propaganda distributed by a registered foreign agent be so labeled. The label must indicate the relationship between the information and the person transmitting it, that the supplier is a foreign agent, that information about the agent's registration is publicly available, and that the registration of the foreign agent does not mean that the contents of materials distributed by the agent have been approved by the government. The word "propaganda" need not appear on the label. The wording suggested by the Department of Justice is:

This material is prepared, edited, issued or circulated by [name and address of registrant], which is registered with the Department of Justice, Washington, D.C., under the Foreign Agents Registration Act as an agent of [name and address of foreign principal]. Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States.

See DeCair, *Justice is Not Censoring Films*, Wash. Post, Mar. 6, 1983 at C7, col. 2. The government claims that the labels may be removed with impunity before the films are shown to the public. This claim, however, is not supported by the language of the Act or by its implementing regulations. See 22 U.S.C. §§ 611-618 (1982); 28 C.F.R. §§ 5.400-402 (1983). Furthermore, this argument is logically inconsistent with the government's justification for FARA. The statute's failure to require a permanent label would undermine its alleged purpose of informing the public about the source of communications. The claim that the label a distributor is required to attach to a film may be removed before the film is shown by a person receiving the film from a distributor seems to have been made to challenge the standing of plaintiffs suing the government for its application of the Act to the Canadian films; it does not appear to fit the design of FARA. See *Keene v. Smith*, 569 F. Supp. 1513, 1519 n.2 (E.D. Cal. 1983). The government also fails to consider the prohibitive expense of removing the film labels.

15. As of November 1985, the United States and Canada have not been able to negotiate a treaty aimed at controlling acid rain. See Oakes, *Acid Rain's Political Poison*, N.Y. Times, Apr. 8, 1985, at 17, col. 2.

16. The film includes a scene from *Jap Zero*, a "B" movie of the 1940's starring Ronald Reagan as an eager "Jap hunting" aviator who asks, "How soon do I get a chance to knock one of them down?" McGrory, *supra* note 13.

17. See *infra*, Addendum.

This note assesses the legislative intent behind FARA by examining the statute's legislative background and the history of its enforcement in light of the usual meaning of the word "propaganda." It then questions whether sections 1(j) and 4¹⁸ may constitutionally be applied to the Canadian films, rejecting the government's argument that the word "propaganda" is facially neutral when used in a self-defining statute such as FARA.¹⁹ The note concludes that because no compelling state interest justifies the "political propaganda" designation, application of FARA unconstitutionally inhibits the first amendment rights of the films' distributors, exhibitors and viewers. It also concludes that section 1(j) is vague and overbroad, and that categorization of the Canadian films as political propaganda on the basis of such a vague statute, absent any procedural safeguards, violates the first²⁰ and fifth²¹ amendments of the United States Constitution.

II FARA's History

We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.²²

A. Legislative History

The Foreign Agents Registration Act of 1938 was a criminal

18. If particular materials are political propaganda under § 1, they must be so labeled under § 4; therefore, the two sections of FARA are "inextricable." *Keene*, 569 F. Supp. at 1523. This note focuses on the questionable constitutionality of § 1. An analysis of § 4, while integrally related, is beyond the scope of this note. Application of FARA to the three Canadian films also raises issues of censorship and chilling effect, prior restraint, the validity of the allegedly compelling national security interests advanced by the government, and the right to receive and to distribute information unburdened. These issues, of independent significance, are only touched upon here.

19. "Propaganda" is a broad term that is usually pejorative. See *infra*, text accompanying notes 103-111. In general, it refers to use of mass communications media intended to fool an unsuspecting public. See L. MARTIN, *INTERNATIONAL PROPAGANDA, ITS LEGAL AND DIPLOMATIC CONTROL* 3-54 (1958) for a discussion of the methods of international political propagandists. The government claims, however, that using the word to describe communications does not necessarily have a negative impact on how those materials are received. See *infra*, text accompanying notes 112-123.

20. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

21. The fifth amendment requires fundamental fairness by guaranteeing that no person shall "be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V.

22. H.R. REP. NO. 1381, 75th Cong., 1st Sess. (1937), 83 CONG. REC. 8,021-22 (1938).

registration statute²³ designed to protect the American public from the influence of Nazi and Communist materials.²⁴ It required that all "agents"²⁵ of foreign interests ("foreign principals")²⁶ operating in the United States register with the Secretary of State.²⁷ Although contemporary House and Senate committee reports indicate that monitoring subversive activity was unquestionably the focus of the legislation,²⁸ the word "subversive" did not appear in the final version of the Act. Further, the legislative history does not indicate why the statute did not refer to "subversion" directly. It is likely that Congress wished not only to deal with "subversive"²⁹ communications—those advocating overthrow of the United States government—but also to regulate a broader range of information.³⁰ As a 1938 Senate Report discussing the propaganda menace stated: "[FARA's registration requirement will permit] the American people [to] know those who are engaged in this coun-

23. Violation of the 1938 statute was punishable by a fine of up to \$1,000 and/or two years in prison. 1938 Act § 618. The current statute prescribes a fine of up to \$10,000 and/or five years in prison. 22 U.S.C. § 618 (1982).

24. Schwartz & Paul, *supra* note 2, at 624-25.

25. In the 1938 statute, an "agent" was broadly defined to include a person acting as "public-relations counsel, or as agent, servant, representative, or attorney for a foreign principal or . . . domestic organization subsidized . . . by a foreign principal." 1938 Act § 611. The word "propaganda" was not defined. The term "agent" was redefined in 1966. See *infra* notes 42 and 45.

26. A "foreign principal" was defined as "the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization." 1938 Act § 611. The definition covered "practically everyone from an impersonal government to an individual who was not located in the United States." Schwartz & Paul, *supra* note 2, at 625. The term "foreign principal" was redefined in 1966. See *infra* notes 42 and 45.

27. Enforcement of the Act was transferred to the Attorney General in 1942. Exec. Order No. 9176, 7 Fed. Reg. 4,127 (1942).

28. U. S. Congressional representatives spoke of the need to monitor "subversive activities by the nationals of foreign governments," "propaganda agents," and "secret spies" who "work to strike at the very things we cherish and which are the very fundamentals of our government." See 79 CONG. REC. 2,668 (1935) (statement of Rep. Dickstein); H.R. REP. NO. 423, 73d Cong., 2d Sess., 78 CONG. REC. 11,069 (1944). See also, H.R. RES. 198, 73d Cong., 2d Sess., 78 CONG. REC. 13 (1944).

29. Registration of propagandists who advocate overthrow of the United States government is specifically covered in 18 U.S.C. § 2386 (1983) (originally enacted as Act of October 17, 1940, 54 Stat. 1201). Under the current § 1(j), FARA applies to information falling into three broad categories: that which influences United States citizens with reference to foreign political interests; that which influences citizens with reference to United States foreign policy; and that which promotes violent "racial, social, political or religious disorder . . . in any other American republic." 22 U.S.C. § 611(j) (1982) (emphasis added). See *supra* note 6. Thus, by definition, FARA does not attempt to monitor domestic subversion.

30. See *supra* note 5.

try by foreign agencies to spread doctrines alien to our democratic form of government or propaganda *for the purpose of influencing American public opinion on a political question.*"³¹

In 1942, FARA was amended substantially in an attempt to facilitate more effective enforcement of its provisions.³² Few foreign agents had registered, and few who failed to register had been prosecuted.³³ The additions to the Act were meant to include within their purview only those activities specifically regulated under the original Act.³⁴

As originally enacted and as codified in the 1942 amendments, FARA applied only to purveyors of propaganda "[act- ing] within the United States who [are agents] of a foreign principal and [who are] required to register."³⁵ Thus, through its incorporation of the 1942 amendments, the current Act does not cover persons outside this country who send political propa- ganda materials into the United States.³⁶

31. S. REP. NO. 1783, 75th Cong., 3d Sess. 2 (1938) (emphasis added). An identical statement is found in H.R. REP. NO. 1381, 75th Cong., 1st Sess. 2 (1937).

32. The amendments reflected the perceived need "to continue . . . investigation of subversive activities." 87 CONG. REC. 10,048 (1941); 88 CONG. REC. 802 (1942).

33. Note, *supra* note 3, at 1397; Schwartz & Paul, *supra* note 2, at 625-26.

34. Congress made a "[p]articular effort . . . to insure that none of these [new] definitions could be so interpreted as to include within their compass . . . activities which the Congress did not intend to regulate under its original enactment." H.R. REP. NO. 1547, 77th Cong., 1st Sess. 2 (1941). The Act's 1942 introductory statement explained that FARA was intended:

to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propa- ganda activities *and other activities* . . . for or on behalf of . . . foreign prin- cipals so that the Government and the people of the United States may . . . appraise their statements and actions in the light of their associations and activities.

Pub. L. No. 532, 56 Stat. 248-49 (1942). 77th Cong., 2d Sess. (emphasis added).

35. Act of April 29, 1942, ch. 263 § 1, Pub. L. No. 532, 56 Stat. 248 (1942) [hereinaf- ter cited as *1942 FARA*]. The relevant current section appears at 22 U.S.C. § 614(a) (1982).

36. This omission left a large loophole, and to date no United States statute has been designed to regulate communications by foreign-based propagandists. See Schwartz & Paul, *supra* note 2, at 626. Thus, materials that actually are subversive will not be labeled under FARA if distributed by non-"agents" or from outside the United States, while non-subversive materials distributed by "agents" within United States borders must be labeled. See Note, *supra* note 3, at 1398 for a discussion of what it means to "act within the United States." In addition, agents of foreign principals who are diplomats, their staffs and officials of foreign governments are exempt from registration, as are persons engaged in purely commercial foreign trade, religious, aca- demic, scientific and fine arts pursuits. Attorneys representing foreign principals in the United States are exempt insofar as that representation does not include attempts

The 1942 amendments continued to avoid use of the word "subversive."³⁷ "Political propaganda," undefined in the 1938 Act, was defined broadly in section 1(j).³⁸ Section 4, requiring that all propaganda be labeled and that the names of its recipients be reported to the Justice Department, was added.³⁹ It is likely that Congress' wartime inclusion of a broad definition of "propaganda" represented a compromise with those legislators who would have liked a statute explicitly applicable to "subversives" and "enemy agents."⁴⁰ It is also possible that the broad definition was perceived as permitting FARA's future application to a wider range of materials viewed as threatening democratic philosophy and traditions.⁴¹

FARA was amended again in 1966,⁴² shifting the focus of the Act:

The original target of foreign agent legislation—the subversive agent and propagandist of pre-World War II days—has been covered by subsequent legislation, notably the Smith Act. The place of the old foreign agent has been taken by the lawyer-lobbyist and public relations counsel whose purpose is not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of his particular client.⁴³

Congress made clear its intention that the amended Act should apply to "agents" acting "for or in the interests of foreign principals" whose activities are "political in nature or border on the political."⁴⁴ Significantly, Congress did not amend the 1942 sec-

to influence or persuade United States agency personnel or officials "other than in the course of established agency proceedings." 22 U.S.C. § 613 (1982). U.S. journalists and news organizations are not "agents." 22 U.S.C. § 611(d) (1982).

37. Although approved by the House, a proposal to make express reference to "enemy agents" was excised in conference. See 87 CONG. REC. 10,051, 10,054, 10,056 (1941); 88 CONG. REC. 797-806 (1942).

38. Congressional concern over subversive activities was strong in 1938 due to the deteriorating political situation in Europe and the large amount of propaganda entering the United States. Talk of the dangers of propaganda was common in Congress. See Schwartz & Paul, *supra* note 2, at 624-25.

39. 1942 FARA § 614.

40. See *supra* note 37.

41. The justification given for the broad definition was that it was not to be used in determining who was required to register as a foreign agent, but only in labeling communications sent by those required to register. S. REP. NO. 913, 77th Cong., 1st Sess. 9 (1941); H.R. REP. NO. 1547, 77th Cong., 1st Sess. 3, 4-5 (1941); Note, *supra* note 3, at 1400.

42. Pub. L. No. 89-486, 80 Stat. 244 (1966). The extent to which FARA's focus shifted in 1966 remains unclear due to Congress' retention of the word "propaganda" in § 1(j). See *infra* text accompanying notes 45 and 46.

43. S. REP. NO. 143, 89th Cong., 1st Sess. 4 (1965).

44. H.R. REP. NO. 1470, 89th Cong. 2d Sess. 2, reprinted in 1966 U.S. CODE CONG.

tion 1(j) definition of "propaganda." Nor did Congress change section 4 in any way relevant to the Act's constitutionality.⁴⁵ Given the substantial changes enacted in 1966, it appears that Congress' retention of the definition determining the breadth of the entire Act was deliberate.⁴⁶

B. Application To Domestic Materials

Citizens and non-citizens who "transmit" propaganda within the United States are required to register if they are working under the direction of a foreign government or political party;⁴⁷ nowhere does the statute indicate that it applies solely to foreign-produced materials.⁴⁸ Any political material, whether produced here or abroad, is subject to the section 4 disclosure requirements if transmitted by a person who must register under section 2.⁴⁹ This dual application has caused much confusion, as all judges who have interpreted FARA have viewed the Act as applicable only to materials produced abroad.⁵⁰ It is

& AD. NEWS 2,397-2417. The term "[bordering] on the political" was used by House members to describe communications "carried on in peculiarly sensitive areas in which the line between political and nonpolitical action is difficult to define." *Id.* at 2,400. This statement should be read in the context of Congress' decision to reframe FARA's purpose so as to encompass the activities of "lawyer-lobbyists" rather than of "secret agents." See *supra* text accompanying note 43.

45. The terms "agent of foreign principal," "public-relations counsel," "political activities" and "political consultant" were changed. H.R. REP. NO. 1470, 89th Cong. 2d Sess., reprinted in 1966 U.S. CONG. AND AD. NEWS 2,397, 2,400-02.

46. See C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 2230, 49.10 (1973).

47. See 22 U.S.C. §§ 611(c): "[An] agent . . . is *any* person who acts . . . at the order, request, or under the control, of a foreign principal . . . within the United States . . . in the interests of [a] foreign government or political party." (emphasis added). For example, former-President Jimmy Carter's brother Billy was forced to register as an agent of Libya. See also Attorney General v. Irish People, Inc., 684 F.2d 928, 945 n.90 (1982) (New York based newspaper required to register). See Note, *supra* note 3, at 1398 for a discussion of FARA's registration requirements as they affect persons outside the United States.

48. Read correctly, the statute says that *any* political materials used by *any* person who must register under FARA may be deemed to be political propaganda. Section 1(j)(1) refers to "*any* . . . communication . . . by *any* person . . . which . . . will . . . influence a recipient . . . within the United States with reference to the political or public interests . . . of a government of a foreign country . . . or . . . to the foreign policies of the United States." 22 U.S.C. § 611(j)(1) (1982) (emphasis added). Section 4 mandates labeling "*any* political propaganda." 22 U.S.C. § 614(a) (1982) (emphasis added). In defining an "agent of a foreign principal" as *any* person who acts "within the United States" "under the direction" and "in the interests of" a foreign government or political party, § 1(c) in no way indicates that such agents must use only foreign produced materials in their efforts to influence U.S. citizens. 22 U.S.C. § 611(c) (1982).

49. See *supra* notes 47 and 48.

50. See *Keene v. Smith*, 569 F. Supp. 1513, 1520 (E.D. Cal. 1983); *Block v. Smith*,

most likely, though, that materials like the three Canadian films,⁵¹ both foreign-produced and distributed by a foreign agent, would be caught in the FARA net. Because they must regularly deal with the Immigration and Naturalization Service, the Internal Revenue Service, and the Bureau of Customs in the course of conducting their business here, foreign producers are more apt to be subjected to FARA's registration requirements than are domestic producers.

Courts have upheld the federal government's right to regulate under FARA as grounded in its inherent power to conduct foreign relations.⁵² Nevertheless, the first amendment protects our right to receive untrammelled speech from abroad.⁵³ Even if FARA applied only to speech of foreign origin, those communications could not be burdened absent a compelling state interest.⁵⁴ For first amendment purposes, information is information; its origin is irrelevant.⁵⁵

III

FARA's Enforcement

A. Enforcement History

FARA's registration requirements have been upheld on the ground that the Act protects national security interests.⁵⁶ How-

583 F. Supp. 1288 (D.D.C. 1984). See also *Viereck v. United States*, 318 U.S. 236, 251 (Black, J., dissenting).

51. See *supra*, text accompanying notes 13-16.

52. *Attorney General v. Irish People, Inc.*, 684 F.2d 928, 944 (D.C. Cir. 1982); *Attorney General v. Irish Northern Aid Comm.*, 346 F. Supp. 1384, 1390 (S.D.N.Y.), *aff'd*, 485 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972); *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951).

53. See *infra* note 85; *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (right to read foreign material), *citing* *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive information is protected); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (right to ideas is important right); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (right to receive information is fundamental).

54. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8 (1978); see also *infra* note 85.

55. See, e.g., *Kleindienst v. Mandel*, 408 U.S. at 762-63. This argument was suggested by John G. Donhoff, attorney for Barry Keene, in a telephone interview (Oct. 31, 1984).

56. See, e.g., *Attorney General v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982) (registration requirement does not burden speech); *Attorney General v. Irish Northern Aid Comm.*, 530 F. Supp. 241, 253 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982); *Attorney General v. Irish Northern Aid Comm.*, 346 F. Supp. 1384, 1390-91 (S.D.N.Y.), *aff'd*, 485 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972) (upholding compelled reporting of contributors to registered foreign agents); *United States v. Peace Infor-*

ever, neither the Act's disclosure requirements nor the section 1(j) definition of "propaganda" has been judicially tested.

In 1943, the Act's registration requirement was challenged unsuccessfully in *Viereck v. United States*.⁵⁷ The *Viereck* Court stated that FARA's purpose is "to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda."⁵⁸ Justice Black, with whom Justice Douglas joined, stated his belief that FARA's requirements do not chill first amendment rights. The Act, he said,

[r]ests on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, [and that] this bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed in the First Amendment.⁵⁹

During the 1950's and early 1960's, the United States Post Office borrowed FARA's expansive definition of "political propaganda" to justify its confiscation of huge amounts of foreign mail under the Espionage Act of 1917.⁶⁰ Using section 1(j) as a guideline, all mail from Communist countries was routed to a

mation Center, 97 F. Supp. 255, 263-64 (D.D.C. 1951) (federal government has power to prohibit interference with foreign affairs); *United States v. Auhagen*, 39 F. Supp. 590, 591 (D.D.C. 1941) (registration requirement not intended to deprive citizens of access to information); *Viereck v. United States*, 318 U.S. 236, 243-45 (1943) (agent not required to disclose propaganda activities conducted on own behalf rather than as agent of German government). The government's pattern of enforcing other FARA provisions raises some questions similar to those reached under the equal protection clause that are beyond the scope of this note. For a recent and thorough review of FARA's legislative and enforcement history, see *Attorney General v. Irish People, Inc.*, 684 F.2d at 937-45.

57. 318 U.S. 236 (1943).

58. *Id.* at 241.

59. *Id.* at 251 (Black, J., dissenting on other grounds). The government relies on this forty-year-old statement to support its claim that application of FARA to the Canadian films promotes free and open debate. Defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction and in Support of Motion to Dismiss at 19, *Keene v. Smith*, 569 F. Supp. 1513 (E.D. Cal. 1983) [hereinafter cited as *Keene Defendants' Memo*]. It is questionable whether this argument would be advanced today. Furthermore, it is not on point in the current challenge because *Viereck* did not address the issues of labeling and reporting. See *supra* text accompanying notes 56 and 57. See also L. TRIBE, *supra* note 54 at §§ 12-8, 12-13; see *infra* note 87.

60. See Schwartz & Paul, *supra* note 2, and Note, *supra* note 3 for a thorough discussion of cold war era exclusion of pro-Communist materials by the United States Post Office.

regional screening office. If Customs authorities determined a piece of mail to be "Communist political propaganda," the mail was held and the addressee notified. Before the mail could be delivered, the addressee was required to fill out a postcard indicating whether he or she wished to receive the material and/or any similar "Communist political propaganda" in the future.⁶¹ In 1965, this policy was declared unconstitutional in *Lamont v. Postmaster General*.⁶² The *Lamont* Court, however, did not reach the issue of section 1(j)'s constitutionality. The Court invalidated the Post Office policy on first amendment grounds, finding that requiring addressees to inform postal authorities that they wished to receive impounded mail unjustifiably limited their freedom of speech.⁶³

B. The Current Challenge

The New York office of the NFBC has been a registered agent of the National Film Board of Canada, Ottawa, Canada since 1947.⁶⁴ The Film Board distributes films and videotapes in the United States for "artistic and commercial purposes."⁶⁵ As a registered agent, the NFBC periodically submits to the Department of Justice a list of the film titles it distributes in the United States.⁶⁶

Between January 1 and June 30, 1982, the Film Board distributed sixty-two films and videotapes in this country.⁶⁷ In the fall of 1982, the Registration Unit of the Internal Security Section of the Criminal Division of the Department of Justice ("Registration Unit") reviewed five of those films, concluding that, because three of them are "political propaganda," the NFBC must

61. *Lamont v. Postmaster General*, 381 U.S. 301, 303 (1965).

62. *Id.* at 307.

63. *Id.*

64. Although the New York office of the NFBC is technically an agent of the NFBC in Ottawa, Canada, the organization is "crown-owned" and thus operates as a quasi-governmental entity analogous to the National Endowment for the Arts in this country. The NFBC is partially funded by the government of Canada but, at least in theory, enjoys complete artistic freedom.

65. National Film Board of Canada Registration Statement for the six month period ending December 31, 1982, cited in Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, at 4, *Block v. Smith*, 583 F. Supp. 1283 (D.D.C. 1984) [hereinafter cited as *Block Plaintiffs' Memo*].

66. *Id.*

67. *Id.*

comply with FARA's labeling and reporting requirements.⁶⁸ The films, which are clearly marked as Canadian,⁶⁹ examine issues of concern to both United States and Canadian citizens.

The NFBC requested that the Department of Justice reconsider its categorization of the films. Pending this reconsideration, the Justice Department agreed not to impose the section 4 requirements.⁷⁰

In 1983, two lawsuits were filed by persons who wished to show the films free of the categorization, labeling and reporting requirements. In *Keene v. Smith*,⁷¹ California State Senator Barry Keene, acting as a private citizen, sought a permanent injunction against FARA's application to the Canadian films and a declaratory judgment that such application was unconstitutional.⁷² The plaintiffs in *Block v. Smith* sought similar relief.⁷³ Mitchell Block, the first named plaintiff in that case, is

68. *Id.* at 4-5. The two films eventually determined not to be political propaganda within the meaning of section 1(j) were *War Story*, a drama based on the experiences of a Canadian doctor interned in a Japanese P.O.W. camp during World War II, and *Offshore Oil*, which examines the impact of oil and technological development on two coastal towns in Norway and Scotland. Peterson, *U.S. Labels Three Films Propaganda*, Wash. Post, Feb. 25, 1983, at A1, col. a. Although these two films do not deal directly with the American experience, they arguably could work to influence U.S. viewers with respect to the interests of foreign powers.

69. The films are identified as produced by the National Film Board of Canada in their introductory titles. They are also marked as NFBC-produced to comply with United States copyright laws. See 17 U.S.C. § 401 (1982).

70. Joseph E. Clarkson, Chief of the Registration Unit, has indicated that the Justice Department will not require labeling of the Canadian films. Brief of Plaintiffs-Appellants at 7 n.7, *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1984) [hereinafter cited as *Block Brief*]. Thus, references in this note to designation of the films as political propaganda are to categorization of the films rather than to any physical label. See also *supra* note 14.

71. 569 F. Supp. 1513 (E.D. Cal. 1983).

72. Complaint for Declaratory and Injunctive Relief at 2, *Keene v. Smith*, 569 F. Supp. 1513 (E.D. Cal. 1983). Keene was granted a preliminary injunction in September 1983. The Department of Justice filed notice that it would appeal directly to the U.S. Supreme Court under 28 U.S.C. § 1252 (1982). This seldom-used rule allows direct appeal to that Court when a lower court holds an act of Congress unconstitutional in a case in which an officer of the U.S., acting in his official capacity, is a party. The Justice Department chose not to act on its initial filing and did not appeal the preliminary injunction. If Senator Keene wins his case in the California District Court, however, the government is likely to seek direct review in the U.S. Supreme Court. Interview with John G. Donhoff, Attorney for Barry Keene (Nov. 19, 1983). Oral argument for a permanent injunction was heard August 8, 1984. The court took the arguments on submission. See the addendum to this article for a discussion of the court's decision.

73. The *Block* complaint was dismissed for lack of standing. 583 F. Supp. 1288 (D.D.C. 1984). Oral argument on appeal was heard February 12, 1985. No. 84-5318 (D.C. Cir., argued Feb. 12, 1985).

the United States distributor of *If You Love This Planet*.⁷⁴ Defendants in both cases were then Attorney General William French Smith and Joseph E. Clarkson, Chief of the Registration Unit.

Plaintiffs in both cases claimed that using the term "political propaganda" to categorize the films is inherently pejorative, denigrates the films,⁷⁵ and stigmatizes those who show them by implying that they are disseminators of distorted information calculated to further the goals of a foreign power.⁷⁶ They contended that this pejorative categorization unfairly associates them with persons who actually intend to deceive the public.⁷⁷ Vilification of the films, they argued, prevents those who would distribute, exhibit and view the films from freely exercising their rights of free speech and free association,⁷⁸ and burdens those who wish to engage in public debate on important national and international policy issues.⁷⁹ Persons who receive films from distributors regulated under the Act are also burdened if forced to take affirmative steps to disclaim or counteract the negative associations triggered by the films' classification.⁸⁰ Deterring persons from receiving information or denigrating the contents of a communication are paradigmatic violations of first amendment freedoms.⁸¹

74. Block is president of Direct Cinema, Ltd. Biograph, another of the *Block* plaintiffs, owns a theater in which the films have been shown. The remaining plaintiffs are the State of New York, Environmental Defense Fund, Environmental Task Force and the New York Library Association, all of which wish to receive and exhibit the films or have already done so.

75. Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at 7, *Keene v. Smith*, 569 F. Supp. 1513 (E.D. Cal. 1983) [hereinafter cited as *Keene Plaintiff's Memo*].

76. See *id.* at 5-7; *Block Plaintiffs' Memo*, *supra* note 65, at 26.

77. See *Keene Plaintiff's Memo*, *supra* note 75, at 5-8.

78. See L. TRIBE, *supra* note 54, at §§ 12-8 and 12-13 for a discussion of the first amendment rights of free speech and freedom of association.

79. See *id.* at § 12-3 - 12-5. See T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-11 (1968) for a discussion of the importance of free speech to a self-governing society, to individual self-fulfillment and to the attainment of truth.

80. *Keene Plaintiff's Memo*, *supra* note 75, at 20. See *supra* text accompanying notes 60-63 for a discussion of *Lamont v. Postmaster General*, 381 U.S. 301 (1965), in which the Court found that inhibiting access to information injures recipients or would-be recipients of a communication. In addition, those who receive 100 or more copies of a film must be listed in the "dissemination report" required under § 4(a). 22 U.S.C. § 614(a) (1982). Thus, they may be inhibited in choosing which films to distribute.

81. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 415-16 (1974) (prison mail rules impeded delivery and violated senders' rights); *Young v. American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) (zoning ordinance that deters would-be au-

The *Block* plaintiffs emphasized that the government exceeded its statutory authority in applying FARA to the Canadian films. FARA was intended to regulate subversive materials only, they asserted, and these films do not fall within the section 1(j) meaning of "political propaganda."⁸² Keene's analysis, however, was not so dependent on Congressional intent.⁸³ Even if not originally intended to inhibit speech, he argued, the term "political propaganda" is unquestionably derogatory today and taints any communication to which it is applied. Laws which inhibit speech must be given strict scrutiny, and no compelling government interest justifies this categorization.⁸⁴ Thus, plaintiffs in both cases asserted that FARA works to chill basic first amendment rights.⁸⁵

dience violates its rights); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (government required right to reply to editorial violates first amendment).

82. *Block* is clear to point out that "[r]egardless of what Congress intended, plaintiffs are injured if the designation is likely to denigrate the films and deter access to them." *Block Brief*, *supra* note 70, at 3. The statutory construction argument may be viewed in two ways. First, plaintiffs can argue that § 1(j) is ambiguous and must be interpreted by the court, emphasizing that there can be no reason for the FARA scheme if it is not in fact derogatory. Or, assuming no ambiguity in § 1(j), the plaintiffs can argue that there is no legal reason for using the derogatory term "political propaganda" in § 1(j). Telephone interview with John G. Donhoff, attorney for Barry Keene (Oct. 31, 1984).

83. See *supra* text accompanying notes 22-46.

84. See L. TRIBE, *supra* note 54 at § 12-8. See also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (state imposed restrictions on speech demand exacting scrutiny); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978) (judicial function to scrutinize legislative actions affecting speech); *United States v. Carolene Prods.*, 304 U.S. 144, 152-153 n.4 (1938) (restrictions on Bill of Rights receive exacting scrutiny). Some forms of regulation that are non-intrusive and that do not amount to prior restraint can apply to some forms of speech. Restrictions on the time, place, and manner of speech are often allowed. But see L. TRIBE, *supra* note 54 at § 12-3, explaining that the government may not try to control speech by invoking the "permissive talisman" of time, place or manner. Keene relies in large part on *Lamont v. Postmaster General*, 381 U.S. 301 (1965) and *Virginia Bd. of Pharmacy v. Virginia Consumers Council, Inc.*, 425 U.S. 748 (1976). The *Lamont* Court did not question the derogatory implications of the term used by the Post Office, stating that "[a]ny [person] is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" 381 U.S. at 402; see *supra* text accompanying notes 60-63. In *Virginia Pharmacy*, a consumers' group sued to invalidate a statute which regulated pharmacists because the regulatory scheme inhibited the consumers' right to receive information. *Virginia Pharmacy*, 425 U.S. at 753-56. Although the Keene court found that Keene had suffered a "distinct and palpable" injury and thus had standing to sue under *Warth v. Seldin*, 422 U.S. 490 (1975), Keene is not within the ambit of FARA because he is a recipient of the films rather than a distributor. See *Keene v. Smith*, 569 F. Supp. at 1518.

85. *Keene Plaintiffs' Memo*, *supra* note 75, at 12, *Block Plaintiffs' Memo*, *supra* note 65, at 22-23. First amendment scholar Laurence H. Tribe agreed: "Censorship can include requiring that something be added. It is the right of the listener to hear

In both cases, the Justice Department argued that FARA furthers a compelling national security interest by promoting a free marketplace of ideas.⁸⁶ Requiring disclosure of identifying information, it claimed, guarantees that the marketplace will not be subverted.⁸⁷ FARA is purely a disclosure statute, the government argued, and the Supreme Court has found dislo-

the uncensored content of what people have to say." N.Y. Times, Feb. 26, 1983, at 16, col. 5. Any unjustified burdening of the right to communicate or to receive a communication chills first amendment guarantees and is thus unconstitutional. See *L. TRIBE*, *supra* note 54, at § 12-8. The government may interfere with basic first amendment freedoms only to protect a vital national interest. *Id.* Conditioning unburdened receipt of materials on their contents without such justification is unconstitutional. *First Nat'l Bank v. Bellotti*, 435 U.S. at 786 (speech may be restricted only if justification compelling); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (burden on government to show valid justification for restricting speech); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (restriction on speech must be narrowly drawn). See also *Near v. Minnesota*, 283 U.S. 697 (1931) (invalidating injunction against libelous publication); *Lovell v. Griffin*, 303 U.S. 444 (1938) (invalidating licensing system for distribution of literature as applied to pamphlets and leaflets); *Thomas v. Collins*, 323 U.S. 516 (1945) (registration system for public speakers invalidated); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (informal state commission approval of books found invalid); *Freedman v. Maryland*, 380 U.S. 51 (1965) (procedure for prior review and censorship of films lacked adequate safeguards). The first amendment protects the right to receive information. *Virginia Bd. of Pharmacy v. Virginia Consumers Council, Inc.*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *New York Times v. Sullivan*, 376 U.S. 254 (1965). The right to speak freely means little if a speaker's intended audience is not free to receive the communication; interference with reception is an injury separate from interference with the right to speak. "The dissemination of ideas can accomplish nothing if otherwise willing [recipients] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont*, 381 U.S. at 308 (Brennan, J., concurring). Significantly, the rights to distribute, exhibit and view a film or videotape are related in a different way than are the rights that attach to print media, because films are almost always meant to be viewed by groups of people. *Keene Plaintiff's Memo*, *supra* note 75, at 13-14. Any burdening of would-be exhibitors' rights to receive a film from a distributor prevents them from "speaking" by showing the film freely to others. Restraining receipt and exhibition of films thus interferes with the right to associate freely with others who wish to view and to discuss the films. See *Talley v. California*, 362 U.S. 60, 64-65 (1960) (handbill ordinance requiring identifying information invalidated); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (compelled disclosure of membership lists chills right of association). Application of FARA also involves distinct categorizing, labeling and reporting requirements which may affect distributors, exhibitors and viewers differently. For example, while the government claims that FARA's requirements do not mandate that a film exhibitor keep any FARA label attached to a film on which it was placed, an original distributor such as the NFBC cannot show the film without the label. See *supra* note 14.

86. See *supra* note 56 for decisions finding FARA constitutional for national security reasons.

87. The "marketplace of ideas" argument for freedom of speech posits that the best test of truth is the power of an idea to gain acceptance in the arena of competing thoughts. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting); see *L. TRIBE*, *supra* note 54, at § 12-1.

sure statutes to be valid when they serve a compelling governmental interest.⁸⁸

The Justice Department also pointed out that the section 4 labeling requirement does not mandate use of the word "propaganda."⁸⁹ Furthermore, even if it did, the word is neutral, not pejorative.⁹⁰ Propaganda is defined under section 1(j)—*for purposes of FARA*—to include *any* "political advocacy materials," not just those using techniques intended to deceive the public.⁹¹ According to the government, FARA's requirements impose merely a slight intrusion—one that is harmless to first amendment rights.⁹² Non-subversive information may be relayed simply by taking steps to ensure that the public is aware the material originates with foreign agents.⁹³

In September 1983, Keene was granted a preliminary injunction in federal court exempting the films from the Act's requirements *pendente lite*.⁹⁴ The court found the section 1(j) definition of "political propaganda" to be of doubtful constitutionality.⁹⁵ The court also found section 1(j) to be vague and overbroad, interfering with first amendment guarantees in the particularly sensitive area of political discourse.⁹⁶ The decision did not rely on previous rulings on FARA's constitutionality because, despite Justice Department claims to the contrary, these rulings were held to be irrelevant to a consideration of

88. See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. 382, 411-12 (1950) (requiring labor officials to provide affidavits that they are not Communists is constitutional); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 101-03 (1961) (compelled disclosure of Communist Party membership justified by threat); *NAACP v. Alabama*, 357 U.S. 449, 463-66 (1958) (compelled disclosure of NAACP membership not sufficiently justified). Note that decisions validating compelled disclosure of Communist Party membership are no longer followed. L. TRIBE *supra* note 54, at 708.

89. See *Keene Defendants' Memo*, *supra* note 59, at 9-10.

90. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment and in Reply to Opposition to Motion to Dismiss or, in the Alternative, for Summary Judgment at 1, 26-28, *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1984) [hereinafter cited as *Block Defendants' Memo*].

91. *Id.* at 3. As suggested by John G. Donhoff, attorney for the Keene plaintiff, the government has not explained what it means by the term "political advocacy materials." Interview with John G. Donhoff (Nov. 19, 1983).

92. *Block Defendants' Memo*, *supra* note 90, at 38-43.

93. Subversive materials are regulated under 18 U.S.C. § 2386, see *supra* note 29; see also *Keene Defendants' Memo*, *supra* note 59, at 24.

94. *Keene*, 569 F. Supp. at 1513.

95. Technically, granting a preliminary injunction indicates that the court held sufficient doubt regarding the Act's constitutionality to warrant further litigation. Telephone interview with John G. Donhoff, attorney for Barry Keene (Oct. 31, 1984).

96. *Keene*, 569 F. Supp. at 1520.

section 1(j).⁹⁷ The opinion noted that "[n]o court has ever held that Congress acted Constitutionally when it chose to characterize all material originating from a foreign source and addressing public issues as propaganda."⁹⁸

The court accepted plaintiff's contention that FARA was meant to describe "pernicious" communications, implicitly finding the Act's wartime and cold war purpose inapposite to current films discussing issues of public concern.⁹⁹ In addition, it rejected the argument that branding *all* materials of foreign origin as "political propaganda" advances any government interest in assuring that the public can identify the source of materials it sees because "Congress could easily have imposed an identification requirement without denigrating the affected materials."¹⁰⁰ The court also expressed doubt that any interest the government may have in labeling "advocacy materials" is a compelling one.¹⁰¹

The opinion forcefully rejected the government's assertion that the phrase "political propaganda" is a neutral term of art, understood by the "ordinary individual" to have a non-pejorative meaning:

[E]ven Congress must ultimately respect the limits of the English language This Court therefore harbors some doubt about the power of Congress to select a term which has a widely understood negative connotation and to designate it as a term of art theoretically having no negative connotation. It may be beyond the power of Congress to determine, for example, that all materials addressing public policy issues and originating from foreign sources shall hereinafter be called

97. *Id.* As discussed in the text accompanying notes 47-50, *supra*, the court misreads FARA to cover only materials produced abroad.

98. *Keene*, 569 F. Supp. at 1520.

99. *See supra* note 15.

100. *Keene*, 569 F. Supp. at 1520; *see also supra* note 69 and notes 47-51 and accompanying text. One might ask whether the Department of Defense labels its films as propaganda.

101. *Keene*, 569 F. Supp. at 1520; *see also* *Talley v. California*, 362 U.S. 60, 65 (1960) (handbill ordinance requiring identifying information invalidated); *Gibson v. Florida Legislature Investigative Comm.*, 372 U.S. 539, 557-58 (1963) (investigation of claimed NAACP-Communist Party link invalidated due to inadequacy of evidence); *Rosen v. Port of Portland*, 641 F.2d 1243, 1251 (9th Cir. 1981) (ordinance requiring advance registration by Jews for Jesus wishing to exercise first amendment rights at airport invalidated); *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1264 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1975) (exercise of Senate subpoena power threatened first amendment rights); *Shelton v. Tucker*, 364 U.S. 41, 57-58 (1953) (Douglas, J., concurring) (exacting standards required when congressional investigation may threaten first amendment guarantees).

"poison" or "obscenity." There are words which cannot be stripped [of] their nuance.¹⁰²

IV

Neutral Propaganda

The term propaganda is susceptible of so many definitions that it is hard to make it the subject of a law.—L. Martin¹⁰³

A. Etymology And Common Usage

Originally a neutral ecclesiastic term referring to a Roman Catholic group charged with propagating the faith,¹⁰⁴ the word "propaganda" gradually took on a secular political meaning.¹⁰⁵ In 1964, propaganda scholars John B. Whitton and Arthur Larson wrote that "[t]he word 'propaganda' . . . has gradually come to acquire a tainted and unpleasant connotation. It suggests that someone is trying to put something over on us."¹⁰⁶ Scholar Leonard Doob has stated that "[a]lmost any other name sounds sweeter to most people."¹⁰⁷ According to Doob,

102. *Keene*, 569 F. Supp. at 1522. The court's analogy misreads FARA to cover only foreign-produced materials. See *supra* notes 47-51 and accompanying text.

103. Martin, *supra* note 19, at 10.

104. From the Latin *Congregatio de propaganda fide*, meaning "congregation for propagating the faith." VIII THE OXFORD ENGLISH DICTIONARY 1466 (1933).

105. *Id.* The Oxford English Dictionary traces the word's origins in ecclesiastic history. It was first used to mean "a committee of Cardinals of the Roman Catholic Church having the care and oversight of foreign missions, founded in 1622 by Pope Gregory XV." The first derogatory dictionary definition of the word is found in Brande's, *DICTIONARY OF SCIENCE, LITERATURE AND ART* (1842), which explained that "the name *propaganda* is applied in modern political language as a term of reproach to secret associations for the spread of opinions and principles which are viewed by most governments with horror and aversion." The ancients spread propaganda. Kautilya's *ARTHASASTRA*, circa 300 B.C., an ancient Indian text similar to Machiavelli's *The Prince*, teaches that a king should send secret agents into the marketplace to dispute the merits of the current regime while lauding the benefits of orderly government and the divinity of kingship. Always, he cautions, those agents should conclude that the current ruler is best. B.S. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER* 1 (1968).

106. J.B. WHITTON & A. LARSON, *PROPAGANDA, TOWARDS DISARMAMENT IN A WAR OF WORDS* 9 (1964). One federal court faced with the need to define "propaganda" in a FARA registration case held that determining just what constitutes propaganda is a subject for expert testimony. *United States v. German-American Vocational League, Inc.*, 153 F.2d 860, 865 (3d Cir. 1946), *cert. denied*, 328 U.S. 833 (1946) (finding conspiracy to violate FARA's registration requirements).

107. L. DOOB, *PUBLIC OPINION AND PROPAGANDA* 231 (1966). Doob further states that "[a]n effective way in Anglo-Saxon society to insult, belittle or expose a man is to call him a propagandist." *Id.* at 231-32. Doob is Sterling Professor Emeritus of Psychology at Yale University.

whether information comes to be categorized as propaganda depends upon the political and social philosophies or ideologies involved.¹⁰⁸ According to Edwin Newman, Head of the Usage Panel of the American Heritage Dictionary, "whatever its origin, propaganda has become a 'dirty word' . . . [W]hen something is labeled propaganda, it should be looked at closely and with suspicion. Indeed, calling something propaganda amounts, for all practical purposes, to saying that it is not worth considering, that it is to be dismissed."¹⁰⁹ Propaganda scholar L. John Martin examined twenty-six modern definitions of the word, finding that all were in accord in stating propaganda to be "the art of influencing, manipulating, controlling, promoting, changing, inducing, or securing the acceptance of opinions, attitudes, action or behavior."¹¹⁰ Clearly, any attempt to trace and argue various possible connotations of the word today is academic; common usage tells us that the term is derogatory.¹¹¹

B. The Government's Definition: A Neutral Term of Art

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."—Lewis Carroll¹¹²

The government claims that, as defined in the Act, the term "political propaganda" is a neutral term of art,¹¹³ and that section 1(j) is meant to define "propaganda" for purposes of FARA only.¹¹⁴ If the term is broadly construed, it asserts,¹¹⁵ a reader

108. *Id.* at 231-32.

109. *Block Plaintiffs' Memo*, *supra* note 65, at 27-28 n.***.

110. Martin, *supra* note 19, at 12.

111. One might ask disingenuously whether when one hears the word propaganda one thinks of a committee of 17th-century cardinals committed to spreading the faith (see *supra* note 105) or, rather, of something deceptive and biased.

112. L. CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 269 (Gardner ed. 1960), cited in Keene, 569 F. Supp. at 1522.

113. By implication, the government considers the term "foreign political propaganda" to be a neutral term of art.

114. See *Block Defendants' Memo*, *supra* note 90, at 1-3, 40-42. Extending this logic, if Congress had chosen to describe materials regulated under the Act as "subversive," it could have defined that word for purposes of FARA to be a neutral term of art.

115. See *id.* at 3, 26-28, 38. The government pointed to *United States v. Kelly*, 51 F. Supp. 362 (D.D.C. 1943), a FARA registration case, to support its argument that the

may reach not only the word's negative connotation, but also the non-pejorative, non-stigmatizing meaning of "materials designed to persuade or influence."¹¹⁶ In applying this definition, the government makes no judgment regarding the truth or value of materials.¹¹⁷ FARA is purely a disclosure statute aimed at educating the public as to the source of the communications it receives.¹¹⁸ Thomas P. DeCair, Director of the Justice Department's Office of Public Affairs, suggested that the section 4 label is "not unlike the disclosures . . . required on almost all political advertisements and commercials, or on packages sold in supermarkets."¹¹⁹

The government argued that:

the federal judiciary [does not sit] as some sort of ultimate committee of lexicographical revision to ensure the linguistic purity of statutory language, and should [not] . . . set aside congressional enactments based upon no more than the often transient "connotation" that a particular phrase may have in the public's mind.¹²⁰

The Department of Justice admonished the *Keene* and *Block* plaintiffs not to imagine that the public would elect to ignore a statutory definition and would instead choose to rely on a "visceral negative connotation."¹²¹ The government argued that:

a judgment by the public to be less receptive to *foreign* advocacy is a valid exercise of the public's right to formulate opinions and judgments about materials to which it is exposed; such reasoned judgments are *precisely* the purpose of the FARA.

[A]rmed with full disclosure, the public will make *reasoned*

term "propaganda" is to be broadly construed. *Id.* at 29-35. The *Kelly* court found that FARA is concerned not only with disclosing the source of materials that advocate subversive activity, but also with identifying those distributed "at the instance of, and particularly when pursuant to compensation paid, by [foreign interests], whether friendly or unfriendly, whether violent or mild." *Kelly*, 51 F. Supp. at 363. The Justice Department's reliance is, however, misplaced. The *Kelly* ruling was specific to those allegations made in a FARA registration case. Rather than speaking to the nature of the term "propaganda," the court in that case merely restated the Act's purpose in determining to whom the section 4 registration requirements apply.

116. *Block Defendants' Memo*, *supra* note 90, at 17 n.*, 13-18.

117. *Id.* at 28-29.

118. *Id.* at 40-41; Defendants' Memorandum of Points and Authorities in Reply to Opposition to Motion to Dismiss at 7-8, *Keene v. Smith*, 569 F. Supp. 1513 (E.D. Cal. 1983), [hereinafter cited as *Keene Defendants' Reply*].

119. DeCair, *supra* note 14, at col. 6.

120. *Block Defendants' Memo*, *supra* note 90, at 2.

121. *Block Defendants' Memo*, *supra* note 90, at 17 n.*.

judgments based on *all* information to which it is exposed.¹²² Moreover, even if the public held erroneous biases regarding the term "propaganda," the Department of Justice denied that these biases could be attributed to the government's *applying* FARA to particular materials.¹²³ The government also opined that the films' would-be exhibitors could avoid any perceived stigma by choosing not to show the materials.¹²⁴

In granting Keene a preliminary injunction, the *Keene* court recognized the logical inconsistencies in the government's claim. The court specifically found that FARA's legislative history shows that the term "political propaganda" *was* intended to denigrate materials to which it is applied:

Congress defined "political propaganda" broadly, not because it was casting about for a neutral term to describe material appropriately labeled, but because it was determined to prevent any pernicious publications from escaping the statutory net Congress was trying to describe clearly and comprehensively that which it perceived to constitute a threat to the polity, and it used terms which it understood to convey that perception. Congress was acting artlessly when it defined the term "political propaganda."¹²⁵

Congress could easily have enacted a statute requiring only that films dealing with political subjects be identified by country of origin. This approach would have avoided any risk of denigrating the affected materials.¹²⁶ Moreover, if FARA is merely a disclosure statute that identifies materials on topics of interest to foreign powers, all five NFBC films submitted to the Registration Unit in the fall of 1982 arguably should have been

122. *Block Defendants' Memo*, *supra* note 90, at 16-17, 17 n.*. The government clearly intends to argue that the public may conclude that materials distributed by registered foreign agents are more suspect than those distributed by non-agents. See *supra* notes 47-51 and accompanying text.

123. *Id.* at 18 (emphasis added). This argument seems disingenuous, designed to circumvent standing for the *Block* plaintiffs rather than to be taken at face value. For a discussion of the standing issue in *Block v. Smith*, see *Block Plaintiffs' Memo*, *supra* note 65, at 43-45; *Block Defendants' Memo*, *supra* note 90, at 3-23. The government acknowledges that "due in part to [its] evaluation of the materials, some portion of the public may form a negative opinion about the materials and about third parties who choose to promote the materials in the United States," but claims it describes materials as "propaganda" in pursuit of a valid national security interest in disclosure of the source of "foreign advocacy" materials. *Keene Defendants' Reply*, *supra* note 118, at 1-2.

124. *Keene Defendants' Memo*, *supra* note 59, at 14.

125. *Keene*, 569 F. Supp. at 1522.

126. See *id.* at 1520.

deemed to fall within section 1(j).¹²⁷ Furthermore, it would be paradoxical to choose a harmless term to describe speech from which citizens must be protected. The government cannot adequately explain how these "harmless," "neutrally characterized" communications differ from similar or identical materials distributed by persons exempt from FARA's registration requirements,¹²⁸ or from similar or identical materials produced in the United States.¹²⁹ Congress would not have acted to affect benign communications.

The government also argued that FARA's categorization and labeling requirements should be upheld because any publicly perceived bias toward the affected films would not be the result of FARA's application but, rather, of public misapprehension of the term "propaganda."¹³⁰ That argument flies in the face of first amendment theory. It suggests—incorrectly—that, to be found invalid, a statute not only must inhibit speech, but also must be *intended* to do so.¹³¹ The *Keene* court specifically determined that "it is . . . enforcement of the statute which is the cause of [Keene's] injury."¹³²

The government's argument that the films' would-be exhibitors may avoid any perceived stigma by choosing not to air the materials also turns the first amendment on its head.¹³³ The first amendment guarantees that a citizen's choice to speak or not to speak will be freely made.¹³⁴ The *Keene* plaintiff argued forcefully that the government may not ask speakers to refrain from exercising their rights:

Under the guise of encouraging "free and open debate" defendants decide to use the power and influence of the federal government to undercut the arguments of their domestic political opponents on matters of grave national importance. The defendants may wish to attempt to sway the public by pointing to the foreign source of the films plaintiff may use in debate.

127. See *supra* note 68.

128. See *supra* note 36.

129. The government has consistently assumed, incorrectly, that FARA applies only to foreign-produced materials. See *supra* notes 47-51.

130. See *Block Defendants' Memo*, *supra* note 90, at 18.

131. See L. TRIBE, *supra* note 54, at § 12-20; see also *infra* note 142.

132. *Keene*, 569 F. Supp. at 1518 (emphasis added).

133. See *Keene Defendants' Memo*, *supra* note 59, at 14.

134. See L. TRIBE, *supra* note 54, at § 12-8. This argument was suggested in Memorandum in Opposition to Defendants' Motion to Dismiss and in Reply to Defendants' Answer to Plaintiff's Motion for Preliminary Injunction at 10, *Keene v. Smith*, 569 F. Supp. 1513 (E.D. Cal. 1983).

They are free to attempt to make such a case. The First Amendment prohibits, however, those same opponents from using the neutral machinery of government to characterize a film as untrustworthy, even subversive, and then, in effect, to *dare plaintiff or anyone else to use at his own risk*. That is not debate. That is abuse of power.¹³⁵

V

Strict Scrutiny

Self-governing citizens cannot undertake their democratic responsibilities where the government rigs the marketplace of ideas by forcefully discounting particular messages.—The *Block* plaintiffs.¹³⁶

FARA is content-sensitive because it focuses on communications about specific public policy issues.¹³⁷ Speech about issues of public concern is afforded the highest order of protection by the first amendment.¹³⁸ If challenged, a content-sensitive law that impinges on first amendment rights must be given strict scrutiny.¹³⁹ To withstand challenge, the law must be narrowly drawn to further a compelling state interest.¹⁴⁰ Thus, in determining whether the inhibiting effects that plaintiffs claim result from categorizing the Canadian films are constitutionally permissible, the *Keene* and *Block* courts must balance the necessity for the specific "political propaganda" designation against the law's impact on first amendment freedoms.¹⁴¹ That an inhibitory effect on expression is unintended is no

135. *Id.*

136. *Block Plaintiffs' Memo*, *supra* note 65, at 30. See also Attorney General v. Irish People, Inc., 684 F.2d at 928, 956 (D.C. Cir. 1982) (Wald, J., and Bazelon, J., concurring).

137. *Keene*, 569 F. Supp. at 1520.

138. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (political expression given broadest protection); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (competing ideas and policies at core of first amendment); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (first amendment protects discussion about government); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (profound national commitment to uninhibited debate on public issues); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (speech concerning public affairs is essence of self-government).

139. See L. TRIBE, *supra* note 54, at § 12-8. See also, e.g., *Buckley v. Valeo*, 424 U.S. at 59; *First Nat'l Bank v. Bellotti*, 435 U.S. at 783; *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

140. See L. TRIBE, *supra* note 54, at § 12-8. See also, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. at 786; *Elrod v. Burns*, 427 U.S. at 362; *Buckley v. Valeo*, 424 U.S. at 25; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973).

141. See L. TRIBE, *supra* note 54, at 582-84.

defense.¹⁴²

The Attorney General claimed that, on balance, a film's categorization under FARA is but a negligible intrusion into the first amendment freedoms that protect our foreign relations and national defense interests.¹⁴³ At the same time, however, the government cites with approval the 1943 Supreme Court decision in *Viereck v. United States*,¹⁴⁴ which held that FARA's disclosure requirements enhance free speech.¹⁴⁵ This position is inconsistent. Generally, when the government claims that "national security" justifies restricting speech, it is referring to the nation's political security against foreign, anti-United States interests.¹⁴⁶ In contrast, the government here contends that this country's foreign relations and defense interests are best served by restricting speech to promote a free marketplace of ideas in the United States.¹⁴⁷ Thus, a true

142. See, e.g., *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (use tax unconstitutionally singles out press); *Bantam Books v. Sullivan*, 372 U.S. 58, 59-64 (1963) (book categorizing scheme unconstitutional); *Jenkins v. McKeithen*, 395 U.S. 421, 427-38 (1969) (labor commissioner's accusatory function deprived investigatee of rights); *National Black United Fund, Inc. v. Devine*, 667 F.2d 173, 179 (D.C. Cir. 1981) ("rule that substantially impairs the ability of certain groups to convey their message to a desired audience . . . effectively 'abridges speech' even if it is not intended to curtail public debate").

143. See *Block Defendants' Memo*, *supra* note 90, at 42; *Keene Defendants' Memo*, *supra* note 59, at 21. Defendants argued that this policy is furthered by requiring public disclosure of the identity of persons promoting foreign interests through the U.S. mass media. *Block Defendants' Memo*, *supra* note 90, at 42; *Keene Defendants' Memo*, *supra* note 59, at 21.

144. 318 U.S. 236. See text accompanying notes 57-59.

145. See *Keene Defendants' Memo*, *supra* note 59, at 19-20.

146. See generally *New York Times v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers Case) (prior restraint of expression bears heavy presumption of unconstitutionality).

147. See *Block Defendants' Memo*, *supra* note 90, at 42, citing H.R. REP. NO. 1470, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2397, 2398; see also *Keene Defendants' Memo*, *supra* note 59, at 16; see also *supra* notes 57, 59, 87, and accompanying text. The free marketplace of ideas envisioned in numerous judicial interpretations of the first amendment since *Abrams v. United States*, 250 U.S. 616 (1919), is the "free and open debate" of *New York Times v. Sullivan*, 376 U.S. 255 (1964). But see M. YUDOF, WHEN GOVERNMENT SPEAKS—POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 90-93 (1983). According to the first amendment analysis suggested by Mark G. Yudof, the government speaks when it pulls the strings in the marketplace of ideas thereby influencing communication. *Id.* at 90. Rather than promoting some idealized free marketplace, application of FARA to the Canadian films promotes a communications marketplace that, like any other market, "appears to many to be an illusion of the liberal state, dependent upon a blind faith in equality and a hazy ontology obfuscating the real world processes of persuasion and domination." *Id.* at 92. See also T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 699-700 (1970).

marketplace of ideas—one that includes subversive communications¹⁴⁸—is contrary to the government's view of national security. The history of the Act indicates that, in fact, Congress meant to protect the first amendment by exposing subversive and covert activities undertaken in furtherance of foreign interests.¹⁴⁹ FARA, however, is not well designed to promote freedom of discourse.

Whatever the merits of the government's national security concerns,¹⁵⁰ its proffered justification for inhibiting speech has nothing to do with the issue central to *Keene* and *Block*.¹⁵¹ It is not enough to claim that FARA as a whole serves a valid national security function. For the Act to survive strict scrutiny, the government must specifically justify its use of the offending section 1(j) definition.¹⁵² The Justice Department has given no reason why it must categorize regulated materials as "political propaganda." Furthermore, the Act is by no means the least drastic means of ensuring that the films be clearly identified.¹⁵³

VI

Vagueness and Overbreadth

On its face, section 1 could cover almost any documentary which discusses the affairs of the day.—M. Schwartz¹⁵⁴

Even if the government were able to justify use of the section 1(j) definition by balancing its restrictive effect on speech against a compelling interest in the section 1(j) language, FARA is vague and overbroad.¹⁵⁵ As described by the Justice Department, section 1(j)'s definition is sufficiently broad to in-

148. See *supra* note 87.

149. See *supra* text accompanying note 125; see also *supra* notes 28 and 34.

150. See *Keene*, 569 F. Supp. at 1520 n.3. As Justice Black stated in *New York Times v. United States* (the Pentagon Papers Case), "[the] word security is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the first amendment." 403 U.S. at 719.

151. This argument was suggested by John G. Donhoff, attorney for Barry Keene. Telephone interview with John G. Donhoff (Oct. 31, 1984).

152. See L. TRIBE, *supra* note 54, at § 12-8. See also *infra* text accompanying notes 155-169.

153. See *supra* note 69 and text accompanying note 100. If *Keene* or *Block* reaches the U.S. Supreme Court, it seems likely that the Court will construct a balancing test through which the constitutionality of the Act as a whole will be affirmed.

154. Schwartz & Paul, *supra* note 2, at 633.

155. Courts need not reach the vagueness and overbreadth issues unless the government is able to show that FARA is narrowly drawn to further a compelling state interest. See *supra* note 101; *Elrod v. Burns*, 427 U.S. at 362; *Buckley v. Valeo*, 424 U.S. at 25; *Kusper v. Pontikes*, 414 U.S. at 59 (1973).

clude "a film about a country that boasts good seaports and low taxes."¹⁵⁶ Although offered in support of the government's claim that FARA's propaganda designation is a neutral label, this statement reveals section 1(j)'s fatal flaw. Section 1(j) renders the Act unconstitutionally vague and overbroad because the statute may be arbitrarily enforced.

The Supreme Court has ruled repeatedly that a regulatory statute that includes within its ambit constitutionally protected speech is impermissibly overbroad.¹⁵⁷ In *Broadrick v. Oklahoma*,¹⁵⁸ the Court indicated that "substantial" overbreadth must be found to invalidate a law by invoking the overbreadth doctrine.¹⁵⁹ Because section 1(j)'s definition of propaganda is fundamental to application of FARA, and because its imprecise wording is broad enough to include "purely . . . issue discussion,"¹⁶⁰ there is support for the argument that FARA meets the *Broadrick* standard.¹⁶¹

Section 1(j) may be read so broadly as to apply to any materials which might persuade.¹⁶² A law is impermissibly vague if "men of common intelligence must guess at its meaning."¹⁶³

156. Peterson, *supra* note 68.

157. L. TRIBE, *supra* note 54, at §§ 12-24; see also *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (statute regulating soliciting of funds); *Kunz v. New York*, 403 U.S. 290, 295 (1951) (standardless licensing system for religious meetings); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (state bar law regarding segregation litigation); *NAACP v. Alabama*, 377 U.S. 288, 307-08 (1964) (compelled disclosure of associates); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967) (loyalty oath); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974) (opprobrious language).

158. 413 U.S. 601 (1973).

159. *Id.* at 613 (overbreadth doctrine is "strong medicine"); see also *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982) (pre-enforcement challenge to ordinance rejected).

160. *Buckley v. Valeo*, 424 U.S. at 79 (provisions of federal election law unconstitutionally vague because pure issue discussion could be reached).

161. Section 1(j)'s imprecise definition means that the Act may be arbitrarily enforced under § 4. See also *supra*, note 18.

162. Congress could not have intended that FARA regulate all political speech because the Act applies only to speech by those who must register as foreign agents. 22 U.S.C. § 614(a). It is also impossible that Congress intended to regulate all speech by such agents, because § 3 exempts some communications. See *supra* note 36.

163. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (quoting *Connally v. General Contractors Co.*, 269 U.S. 385, 391 (1926) (ordinance requiring "identification" invalidated)). As Justice Marshall reminded us in *Grayned v. City of Rockford*, however, we are "[c]ondemned to the use of words [and] . . . can never expect mathematical certainty from our language." 408 U.S. 104, 110 (1972) (anti-noise ordinance not vague). Thus imprecise language must sometimes be tolerated if what the law says as a whole is clear "when measured by *common understanding* and practices." *Miller v. California*, 413 U.S. 15, 27 n.10 (1973) (emphasis added) (citing *United States v. Petrillo*, 332 U.S. 1, 7-8) (defining obscenity). But see *United States v. Harris*, 347

Two primary justifications are given for the "void-for-vagueness" doctrine.¹⁶⁴ First, a statute must let citizens know how they must behave in order to conform to the law.¹⁶⁵ Second, a criminal statute such as FARA must provide objective enforcement criteria to avoid a "standardless sweep [that would allow those charged with enforcement] to pursue their personal predilections."¹⁶⁶

Determinations as to whether communications are "propaganda" are made by career attorneys in the Justice Department's Registration Unit. The Department claims that its functionaries are qualified to determine what constitutes "propaganda," "based primarily on common sense."¹⁶⁷ Neither the Act nor its implementing regulations provide Registration Unit employees with guidelines beyond the section 1(j) definition.

Whether section 1(j) covers a particular communication is unclear, as evidenced by the controversy surrounding the definition of the term "political propaganda."¹⁶⁸ As the *Block* plaintiffs explain, "[a]n agent is at sea in determining whether

U.S. 612, 624 n.15 (1954) (upholding registration of lobbyists and their funding sources). See also *Red Lion Broadcasting Co. v. FCC*, in which the Court noted that the regulatory language used was as precise as possible given the complicated circumstances involved, and upheld subjective statutory criteria for determining fairness. 381 F.2d 908, 925 (D.C. Cir. 1967), *aff'd* 395 U.S. 367 (1967).

164. For a recent synopsis of void-for-vagueness analysis see *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (finding the word "educational" unconstitutionally vague).

165. *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (no standards specified); *Grayned v. City of Rockford*, 408 U.S. at 108.

166. *Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983) (statute requiring "credible and reliable" identification allowed police too much discretion); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (grounds for denying protest march permit unconstitutionally vague); *Smith v. Goguen*, 425 U.S. at 575. The words "recognized charitable cause," (*Hynes v. Mayor of Oradell*, 425 U.S. at 621); "contemptuously," (*Smith v. Goguen*, 415 U.S. at 566); "treasonable or seditious," (*Keyishian v. Board of Regents*, 385 U.S. at 597-99); and "good character" (*Schneider v. Irvington*, 308 U.S. 147, 163-64 (1939)) are examples of terms which have been found to be unconstitutionally vague in a first amendment context.

167. Thomas P. DeCair, Director of the Justice Department's Office of Public Affairs, defended the Department's reliance on this "I know it when I see it" standard. Peterson, *Canada Asks State Department to Reverse Decision on Three Films*, Wash. Post, Feb. 28, 1983, at A2, col. 1.

168. The language reads in pertinent part: "Expression by any person . . . reasonably adapted . . . to influence a recipient." 22 U.S.C. § 611(j) (1982). The words "influence" and "interests" are also particularly malleable; the word "political" is equally subject to debate as to its meaning. The corollary to the uncertainty surrounding FARA's application is the uncertainty created by possible misapprehension of its allegedly neutral connotation. See *supra* text accompanying notes 112-123.

his speech 'influences' public opinion in the United States regarding the 'public interests' of his principal or whether the Justice Department might think so."¹⁶⁹

In *NAACP v. Button*,¹⁷⁰ Justice Brennan emphasized that "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice . . . or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."¹⁷¹ FARA is such a statute.

VII

Statutory Interpretation of FARA

Words are not pebbles in alien juxtaposition.—Learned Hand¹⁷²

The goal of statutory interpretation is to determine Congressional intent.¹⁷³ According to the canons of statutory construction, statutory interpretation should begin with the words used in the statute,¹⁷⁴ read in a manner consistent with its definitional sections.¹⁷⁵ If a statutory definition is unambiguous, and neither leads to an absurd result nor frustrates legislative intent, a court generally should not look beyond its plain meaning.¹⁷⁶ In such a case, one should not resort to legislative history or to other forms of statutory exegesis.¹⁷⁷ If a definition

169. *Block Plaintiffs' Memo*, *supra* note 65, at 42.

170. 371 U.S. 415 (1963).

171. *Id.* at 433 (statute regulating NAACP's litigation activities invalidated).

172. *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

173. *Philbrook v. Glodgett*, 421 U.S. 707 (1975).

174. *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (construing § 6(b)(1) of the Consumer Product Safety Act); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (construing § 406(a) of the Social Security Act).

175. *C. SANDS*, *supra* note 46, at § 47.07.

176. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (construing § 15(7) of the Interstate Commerce Act). When statutory language is ambiguous, a court must examine congressional intent to determine how to construe the legislation. *See, e.g., Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 9-10 (1976) (construing the Atomic Energy Act and the Federal Water Pollution Control Act); *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868 (9th Cir. 1981).

177. [W]here the words of a law . . . have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law until a judicial construction . . . had been obtained.

could be interpreted so as to give a statute a lawful or unlawful meaning, it should be interpreted so as to preserve the statute's validity.¹⁷⁸

The government pointed to these canons in support of its contention that section 1(j) is constitutional as applied to the Canadian films. It claimed that because "any reference to manipulative, objectionable, misleading or false information" is "[c]onspicuously absent from the FARA's definition of 'political propaganda' . . . it is patently clear that on its face the statute does not characterize advocacy materials [derogatorily]."¹⁷⁹ The court, the government contended, "should not declare a statute which is otherwise valid unconstitutional simply because some persons may give a word an improper construction."¹⁸⁰

This argument has merit to the extent that a statutory definition usually is conclusive,¹⁸¹ "even though [it] does not coincide with the ordinary meaning of the words used."¹⁸² Legal commentators caution, however, that this principle is true only "so long as the prescribed meaning is not so discordant to common usage as to generate confusion."¹⁸³ "If . . . definitions are arbitrary and result in unreasonable classifications or are uncertain, then the court is not bound by the definition."¹⁸⁴ "Definitions . . . may be determinable only through further practice of the methods of interpretation."¹⁸⁵ Moreover, a court may inquire into the contextual meaning of statutory words when there has been a change in circumstances since enactment or when a literal interpretation would be unreasonable.¹⁸⁶

Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89-90 (1823). See *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 643; *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (construing § 1222(3) of the Internal Revenue Code of 1954).

178. *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. at 108 (1980).

179. *Block Defendants' Memo*, *supra* note 90, at 43. See also *supra* note 91.

180. *Block Defendants' Memo*, *supra* note 90, at 43.

181. *C. SANDS*, *supra* note 46, at § 47.07. See also *Colautti v. Franklin*, 439 U.S. 379 (1979) (construing § 5(a) of the Pennsylvania Abortion Control Act); *Consumers Union of the United States, Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978) (bank records exempt from the Freedom of Information Act).

182. *C. SANDS*, *supra* note 46, at § 20.08.

183. *Id.* at § 47.07 (emphasis added). See also *id.* at §§ 20.08, 27.02.

184. *Id.* at § 20.08 (emphasis added).

185. *Id.* at § 47.07.

186. *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966) (construing § 14(c)(5) of the Bankruptcy Act); *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940) (construing §§ 204(a)(1), (2) of the Federal Motor Carrier Act); *Consumers Union of the United States v. Heimann*, 589 F.2d at 534.

Where definitions . . . produce meanings that are too skewed or applications that are too improbable in comparison to natural and ordinary meanings and applications, constitutional problems may doubtless be encountered When a statute defines a word to mean something wholly different from what it means in conventional usage . . . its constitutionality may be subject to question This is in recognition that queer or fanciful definitions may be deceptive and misleading to the ordinary reader because conventional meanings generally tend to crowd artificial meanings from memory.¹⁸⁷

The government's argument that a court should not look beyond the allegedly facially-neutral section 1(j) is premised on a lack of ambiguity in the statutory language. Yet the government itself felt it necessary to examine FARA's history in arguing that the 1(j) language is a neutral term of art.¹⁸⁸

The various possible applications of the section 1(j) definition are evidence of the ambiguity of the term "propaganda" as it is used in the Act, and of the uncertainty of legislative intent regarding FARA's coverage.¹⁸⁹ It is unclear whether Congress' failure to reword section 1(j) when it reworked the law's stated purpose in 1966¹⁹⁰ was deliberate or inadvertent.¹⁹¹ There is no pre-1966 judicial interpretation of section 1(j) with which to compare the current interpretations.

Moreover, because first amendment interests are implicated, courts should be especially careful not to apply statutory language *pro forma*.¹⁹² In general, courts must construe statutes narrowly to avoid raising constitutional issues, especially when first amendment rights are involved.¹⁹³ As the *Block* plaintiffs

187. C. SANDS, *supra* note 46, at § 27.01.

188. See *Block Defendants' Memo*, *supra* note 90, at 28-35.

189. See *supra* text accompanying notes 28-46.

190. See *supra* text accompanying notes 42-46.

191. Amending part of a law "which has received contemporaneous and practical construction may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law." C. SANDS, *supra* note 46, at § 49.10 (emphasis added). It is impossible to state unequivocally that Congress intentionally retained § 1(j) or that it was meant to refer to the same or similar communications both before and after amendment.

192. This argument was suggested in the *Block Plaintiffs' Memo*, *supra* note 65, at 19.

193. *United States v. Grace*, 461 U.S. 171 (1983) (leafletting and picketing on sidewalks surrounding U.S. Supreme Court permitted); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (construing sections of the National Labor Relations Act); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (construing sections of the Immigration and Nationality Act of 1952). It would be dangerous, however, for plaintiffs to depend on the statutory construction argument. It is likely that the Supreme Court

explained, "[h]owever FARA section 1(j) may apply to other communication[s], it should not be construed to reach [the three Canadian] films, which are clearly protected speech, and far afield from the problems Congress sought to remedy by FARA."¹⁹⁴

VIII Conclusion

Under the first amendment, government restraint of speech is severely limited.¹⁹⁵ Thus, serious constitutional problems arise if FARA is to be applied to all communications dealing with controversial political issues. Contrary to the government's claim, FARA's section 1(j) does not focus on true propagandists¹⁹⁶ but, rather, on political communication,¹⁹⁷ and therefore interferes with free expression. Even if FARA serves a compelling state interest by monitoring certain very dangerous communications,¹⁹⁸ the section 1(j) definition of "propaganda" is so expansive and malleable that it renders FARA invalid for vagueness and overbreadth.¹⁹⁹

Application of the Act to the three Canadian films illustrates these principles. The origin of these films is easily identifiable without the FARA label; were it not so clear, a simple "Made in Canada" would do.²⁰⁰ The films have been categorized as propaganda merely because they were distributed by an organiza-

would not invalidate FARA's self-defining § 1(j) on that basis, but would instead find that the rules of statutory construction allow Congress to define a term of art. Telephone interview with John G. Donhoff, attorney for Barry Keene (Oct. 31, 1984).

194. *Block Plaintiffs' Memo*, *supra* note 65, at 19.

195. See L. TRIBE, *supra*, note 54, at § 12-8; see also *supra* note 85. As the government points out, enforcement of FARA is not a prior restraint on speech because the dissemination reports required under § 4 need not be submitted for 48 hours following distribution of a communication. 22 U.S.C. § 614(a). See *Block Defendants' Memo*, *supra* note 90, at 5.

196. See *supra* note 3 for examples of true propagandists. The original FARA was intended to deal with subversive activities "and for other purposes." See *supra* note 5. Congress' failure to use the word "subversive" in the Act and the broad definition added to FARA in 1942 are evidence of an intent to regulate as much information as possible. See *supra* text accompanying notes 28-46.

197. Any communication by a registered foreign agent is subject to regulation under sections 1 and 4 of the Act. See *supra* note 14.

198. See *supra* text accompanying notes 143-153.

199. See *supra* text accompanying notes 154-169.

200. "The sponsorship of the films is no more secret than the Pope's religion." *P' Film Ratings Rate An 'X'*, N.Y. Times, Mar. 6, 1983 at 22, col. 1.

tion that is required to register under the Act.²⁰¹ The same films distributed by persons exempt from FARA would be free of the stigmatizing characterization and label, and of the effects of the reporting requirement. If they had been distributed by persons who are required to register but who had not done so, it is unlikely that those titles would have crossed the desk of the Justice Department's Internal Security Division. Thus, they would have escaped the FARA net.

It is logically inconsistent for the government to argue that "propaganda" is not a derogatory label while simultaneously claiming that it must implement the statute to protect Americans.²⁰² Moreover, the government's claim that it may influence the marketplace of ideas with FARA directly undermines basic democratic principles.²⁰³ As Judge Wald explained in *Attorney General of the United States v. Irish People, Inc.*,²⁰⁴ a decision upholding application of FARA's registration requirements, "I resist the notion that the power of prosecution may be used selectively to manage the information put before the American people in debates over foreign policy."²⁰⁵ Political speech is to be protected above all,²⁰⁶ and public discussion of political issues is burdened when materials are selectively branded as propaganda.

FARA's definitional language is so contrary to popular understanding that it defeats the presumption favoring retention of a statute's internal definition. The "propaganda" classification denigrates the films, brands their distributors, deters potential recipients who would receive the information if it had not been denigrated and causes recipients to be suspicious of the films' contents. The government's claim that "political

201. See *supra* note 11 and accompanying text.

202. See *Block Defendants' Memo*, *supra* note 90, at 1-3, 40-42.

203. "If we advert to the nature of Republican Government, we shall find that the censorial powers in the people over the Government, and not in the Government over the people." J. MADISON, 4 ANNALS OF CONGRESS 934 (1793-95).

204. 684 F.2d 928 (D.C. Cir. 1982).

205. *Id.* at 956 (Wald, J., concurring).

206. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See also *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (political expression given broadest protection); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (competing ideas and policies at core of first amendment); *Mills v. Alabama*, 384 U.S. 214, 218-29 (1966) (first amendment protects discussion about government); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (profound national commitment to uninhibited debate on public issues).

propaganda" operates as a neutral term of art seems disingenuous at best, and fatuous at worst.

ADDENDUM

The United States District Court for the Eastern District of California issued its opinion in *Keene v. Meese*²⁰⁷ on September 12, 1985, enjoining defendants from enforcing "any portion of FARA which incorporates the term 'political propaganda' as a term of art."²⁰⁸ That opinion substantially corroborates the rationale for finding that, as suggested in this note, sections 1(j) and 4 of FARA violate the first amendment.

Holding that the phrase "political propaganda" is "semantically slanted,"²⁰⁹ the court found that the question posed was one of first impression—whether the first amendment limits Congressional power to choose a denigrating word or phrase as a statutory term of art.²¹⁰ The court went on to hold that just as the first amendment prohibits abridging speech which is the object of a Congressional enactment, it prohibits abridging speech through the very form of the enactment.²¹¹ Absent compelling justification, "an otherwise inflammatory phrase" may not be used as a "neutral" statutory definition.²¹²

The court found FARA's section 1(j) definition of "political propaganda" to be a "relatively unambiguous . . . construct of the legislative draftsmen" which, "considered wholly apart from the conventions of ordinary usage," carries no negative meaning.²¹³ The Act's legislative history makes it "abundantly clear," however, that Congress intended to suppress or restrict speech when it wrote section 1(j).²¹⁴ Thus, in selecting the phrase "political propaganda," Congress chose "not so much to flout [linguistic conventions] as to exploit them."²¹⁵ Persons who disseminate materials officially found to be political propa-

207. No. Civ. S-83-287 RAR, slip op. (E.D. Cal. Sept. 12, 1985). Attorney General Edwin Meese, successor to William French Smith, was substituted by the court as defendant in the case pursuant to Federal Rule of Civil Procedure 25.

208. Slip Op. at II H.

209. *Id.* at II B, citing *W. & M. MORRIS, HARPER DICTIONARY OF CONTEMPORARY USAGE* 501 (1975).

210. Slip Op. at II.

211. *Id.* at II E.

212. *Id.* at II C.

213. *Id.* at II B.

214. *Id.* at II E.

215. *Id.* at II G.

ganda "run . . . the risk of being held in a negative light by members of the general public."²¹⁶ Thus, FARA burdens speech by making regulated materials available only to persons courageous enough to use materials which have been "[censored officially] by the government."²¹⁷

Since the government showed no justification, "compelling or otherwise," for use of the phrase "political propaganda," the term not only renders section 1(j) unconstitutional, but also "infect[s]" section 4 of the Act.²¹⁸ Thus, the court concluded, as does this note, that sections 1(j) and 4 of FARA violate the first amendment and are consequently unconstitutional.

216. *Id.* at II F.

217. *Id.*

218. *Id.* at II H.